



May 20, 2009

Arizona Supreme Court
1501 West Washington
Phoenix, Arizona 85007-3231

Re: Petition to Amend Rule 35(b) Arizona Rules of the Supreme Court

Honorable Justices of the Arizona Supreme Court:

Pursuant to Arizona Supreme Court Rule 28(D), the Native American Bar Association of Arizona ("NABA-AZ") respectfully submits this comment in support of the petition to the Court requesting an amendment to Rule 35(b) of the Rules of the Supreme Court to include Indian law as one of the subject areas that may be tested on the Arizona Bar Examination.

Our organization has consistently been a strong supporter of the efforts to include Indian law as a topic on the bar exam. As background, NABA-AZ is a non-profit organization consisting of over sixty members who work in many areas of the legal profession. Our members work in-house and in private practice, in academia and government service and include many tribal attorneys. We have worked on a variety of issues that further our organizational mission to advance and improve the practice of Indian law as well as promoting the professional growth of our members. As such, we believe we are uniquely positioned to provide insight on this very critical issue.

For the reasons set forth below, we strongly encourage and recommend that Indian law be added to the Arizona State Bar Examination.

Arizona attorneys must have a general understanding of Indian law to properly serve the client base in Arizona.

Indian law must be added to the Arizona State Bar Examination because of the prevalence of Indian tribes and the high probability that an attorney practicing in Arizona will encounter an Indian law issue. There are 22 tribes in Arizona and Arizona has the distinction of being the state with the highest percentage of Indian trust lands. Tribes are expanding their economic activities and their interactions with non-Indian entities and individuals at a rate

similar to their municipal neighbors. Arizona Tribes are actively engaging in industries such as real estate development, natural resource development, agriculture, entertainment and tourism and non-Indian businesses and individuals are seeking to locate and work within Indian country. Some Arizona Tribes have developed partnerships with top *Fortune 500* companies including Wal-Mart, AT&T, Bank of America, Peabody Energy, El Paso Gas and John Deere. In fact, in the local Phoenix area, only on the Indian reservations has the construction rate not dropped off during these dire economic times. Given this growth rate, attorneys in Arizona will likely encounter Indian law issues regardless of their area of practice. Accordingly, Arizona attorneys must have at least a basic knowledge of Indian law to adequately perform their duties to help their clients.

Testing of Indian Law is Narrowly Tailored to Test Only Topics of Necessity: Jurisdiction and Sovereign Immunity.

Testing of sovereign immunity and jurisdiction is critical to an attorney's ability to practice in Arizona. Moreover, Indian law interacts with many of the subjects now tested on the Arizona State Bar Examination including civil procedure, constitutional law, contract law, criminal law and real property so it would be fairly easy to incorporate these topics into the exam.

Jurisdiction is of critical importance to an attorney's understanding of laws in Arizona. With Arizona's growth, municipalities and tribes are increasingly physically abutting each other, which is engendering more criminal complaints that require some knowledge of Indian law. Indeed, how federal, state and tribal criminal jurisdiction and laws interact should be understood by every attorney in Arizona. In Arizona, which sovereign may appropriately exercise criminal jurisdiction turns on the status of the land where the action took place, the race and tribal membership of the parties. Therefore, prosecutors and criminal defense attorneys in Arizona must have at least a modicum of Indian law to carry out their duties.

In fact, we can all agree that knowing what forum to resolve disputes in is a fundamental skill that should be tested. For instance, litigation concerning the adoption of Indian children, probate of real property on tribal lands, or auto accidents on reservations may potentially involve complex jurisdictional issues. Failing to properly identify these jurisdictional issues will result in filing a claim in the wrong court and, even worse, malpractice. It will impose avoidable costs on clients and the courts. Thus, an attorney knowing which court has jurisdiction and what law controls will save time and money.

Once the proper forum and choice of law have been determined, an attorney in Arizona must be able to identify sovereign immunity issues and whether they may sue a tribe or a tribal entity. An attorney should be aware that a tribe cannot be sued unless it or the federal government has waived its sovereign immunity. Claims barred by sovereign immunity are easy to spot and avoid bringing to court with only a general working knowledge of Indian law. However, not spotting this issue can impose unnecessary costs on clients—who must pay to have a case prepared—and courts that have to hear claims just to dismiss them. Testing Arizona's lawyers on Indian law will ensure general competence in the areas of jurisdiction and sovereign immunity, and help avoid malpractice claims.

Indian law is Not Too Specialized to Test.

Some have argued that Indian law is too specialized too test. This argument is misplaced and misinterprets the petition before the Court. The petition does not seek to require that applicants acquire specialized knowledge on all aspects of Indian law. To the contrary, the petition is aimed only at ensuring that attorneys licensed in Arizona be able to identify and adequately address fundamental issues of jurisdiction and sovereign immunity. It is undeniable that if competence in these two areas of Indian law is not tested, Arizona's lawyers will be less likely to spot and confront such issues and fulfill their duties under the Rules of Professional Responsibility.

With this proposed bar exam change, Arizonans can be assured that their attorneys are competently rendering valid, candid advice because they have been tested to ensure they have a basic knowledge of these two areas of Indian law and its interactions with other fundamental areas of the law. Therefore, we strongly support the petition to amend Rule 35(b) of the Rules of the Supreme Court to include Indian law as one of the subject areas that may be tested on the Arizona Bar Examination.

Sincerely,

Native American Bar Association of Arizona Members:

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